

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

BOSTON POLICE DEPARTMENT

vs.

BRIAN WALKER & another<sup>1</sup>

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS (sc)

INTRODUCTION

This action arises from the decision of the Human Resources Division of the Boston Police Department ("BPD") to bypass Brian Walker ("Walker") on a list of candidates eligible for appointment to the position of full-time police officer. Walker appealed the decision to bypass him to the Civil Service Commission ("Commission"), which overturned the BPD's bypass decision. The BPD appealed the Commission's decision to this court. Before the court are the parties' Motions for Judgment on the Pleadings. For the reasons that follow, the BPD's motion will be allowed and Walker's motion will be denied.

BACKGROUND

The following facts are taken from the administrative record. See Superior Court Standing Order 1-96, § 5. After taking and passing the municipal police officer civil service examination, Walker was placed on an eligible list for appointment as a full time police officer. On July 10, 2007, Robin W. Hunt ("Hunt"), director of human resources for the BPD, notified the Massachusetts human resources division that she was bypassing Walker on the eligible list.

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<sup>1</sup> Massachusetts Civil Service Commission

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On July 17, 2007, the Massachusetts human resources division notified Walker that the reasons for the bypass were acceptable. The notification sent to Walker included a letter from Hunt to the human resources division, which read, in pertinent part, as follows:

Mr. Walker was arrested by the State Police in 2000 for operating under the influence of alcohol. According to the State Trooper's incident report, Mr. Walker [sic] responded to a call for a motor vehicle accident on the Gilmore Bridge where Mr. Walker was the driver and struck the jersey barrier after having been out at a bar. Upon arrival, the Trooper observed an empty car facing the wrong way on the westbound side of the bridge. Witnesses stated the occupants had left the vehicle so the police located them nearby and brought them to the station. After observing alcohol on Mr. Walker's breath, the Trooper administered a field sobriety test which Mr. Walker failed. Based on 2 different police reports,<sup>2</sup> it was apparent that Mr. Walker was intoxicated and could not follow instructions well enough to perform a breathalyzer test after 6 attempts. His license was suspended for 120 days as a result.

Mr. Walker was also disciplined by an employer when he showed up for work under the influence of alcohol after exercising poor judgment by showing up for his shift after having been at a party.

Lastly, Mr. Walker's sick time usage back to 2004 is of concern to the Department.

(footnote added)

Based on the foregoing reasons, Walker was not hired as a Boston police officer. He

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<sup>2</sup> State Police Trooper Kevin Murray's report stated that he administered "the horizontal gaze nystagmus test" to Walker, during which Trooper Murray "detected the lack of smooth pursuit in both eyes." Trooper Murray also "detected the onset of gaze nystagmus prior to 45 degrees and at maximum deviation." For those reasons, Trooper Murray administered two additional field sobriety tests. During the "nine-step walk and turn test[,] Walker failed to touch heel to toe and failed to count out loud." During the "one-legged stand test[,] Walker put his foot down on his count of nine and when counting stated 27, 28, and then 27 again and then continued to 30."

State Police Sergeant Roy E. Minnehan's report stated that when walking into the State Police barracks, Walker "was a bit unsteady on his feet . . . . [B]eing several feet away from him," Sergeant Minnehan "detected a very strong odor coming from his breath. His eyes were a bit glassy . . . . In 6 attempts, [Walker] never blew properly but would give shallow breaths so the tone would go off and on. The machine finally gave a deficient sample and it was deemed a refusal." Sergeant Minnehan concluded that "Mr. Walker was intoxicated and has been drinking more than he stated."

timely appealed to the Commission. The Commission held a hearing in connection with Walker's appeal and found the following facts.

At the time he applied for a position as a Boston Police Officer, Walker was employed as a Boston Housing Police Officer. Before he served in that capacity, Walker was employed as a police officer for the University of Massachusetts ("UMass") and for Brigham & Women's Hospital. Walker's recommendations, furnished by his supervisors from those jobs, were uniformly positive.

The charge against Walker for operating under the influence was ultimately dismissed for lack of prosecution. Because the BPD had the identities and addresses of the troopers involved with Walker's arrest, but did not interview them as part of its background investigation of Walker, "either . . . the background investigation was inadequate or . . . the [BPD] did not view the arrest as so serious as to warrant investigation." Because of this, the Commission concluded that the BPD's "reliance on the disputed facts contained in the unsubstantiated police reports violates basic merit principles [sic]."

Furthermore, the Commission found that Walker "testified credibly that he has never, in his lifetime, operated a motor vehicle while under the influence and that, on the date in question, he had consumed two beers over several hours. He further testified that the accident was the result of another vehicle swerving into his lane."

The Commission also found that Hunt "admitted that if the 'refusal' alleged was the product of a problem with the breathalyzer, it should not be held against [Walker]. The [BPD] did not assess or investigate [Walker's] written explanation that his breath sample failed to register because the breathalyzer was faulty." The Commission did not cite to any evidence

suggesting that the breathalyzer was in fact faulty, or make any particularized findings concerning Walker's credibility in taking that position.

The Commission concluded that the manner in which the BPD conducted its evaluation of Walker "is an indication of some bias against the candidate. This bias might not be against [Walker] personally, but against the position he held on the [eligible list], for the possible benefit of some unknown candidate(s) below him on the [list.]" The Commission undertook no further effort to illustrate or explain the BPD's purported "bias" against Walker.<sup>3</sup>

Finally, Hunt testified that the BPD had hired people with arrest records, and criminal convictions, as police officers in the past. For these reasons, the Commission concluded that Walker's "arrest was not a legitimate concern for the [BPD], but merely a rationalization for the bypass."

Next, the Commission found that Walker was unexpectedly called into work when employed as a police officer for UMass after he had been drinking. Walker arranged to be driven to work, and reported his condition to his shift commander, who excused him from duty. The BPD expressed concern over this incident, because Boston police officers are sometimes called into work unexpectedly and they are expected to be able to report for duty.

The Commission found that "Boston Police Officers are not prohibited from consuming alcohol while off duty." The Commission concluded that, contrary to the BPD's perspective,

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<sup>3</sup> A videotape of a discretionary interview conducted by the BPD was also entered into evidence. The Commission characterized the tone of the interview as "adversarial," and relied on it in conjecturing that the BPD's evaluation of Walker reflected some type of bias against him.

Walker's actions were "reasonable and responsible behavior under the circumstances."<sup>4</sup>

Finally, the Commission focused on a letter submitted by Walker's supervisor at the UMass police department, stating that "at no time" did Walker's supervisor "think [he] was abusing his sick time or using this time excessively." While Hunt testified that the BPD frowns on an officer using all his sick time before leaving his position, the Commission underscored that "some City employees have been allowed to use their sick leave immediately before leaving their position as [Walker] did," and that the BPD should have investigated the UMass policy governing use of sick time, rather than apply the BPD's standards.

Based on those reasons, the Commission concluded that the BPD did not have reasonable justification for bypassing Walker, and ordered that he placed atop the eligibility list for appointment as a Boston police officer.

### DISCUSSION

An administrative agency's decision may be set aside only on the grounds set forth in G. L. c. 30A, § 14(7); *Howard Johnson Co. v. Alcoholic Beverages Control Comm'n*, 24 Mass. App. Ct. 487, 490 (1987). These grounds include such reasons as the agency's decision is not supported by substantial evidence, or is otherwise not in accordance with law. G. L. c. 30A, § 14(7)(e), (g). This court is required to give "due weight to the experience, technical competence and specialized knowledge of the agency, as well as to the discretionary authority conferred on it." G. L. c. 30A; see also *Cobble v. Comm'r of Dep't of Soc. Servs.*, 430 Mass. 385, 390 (1999). The court's role is not to "make a de novo determination of the facts or draw different inferences

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<sup>4</sup> The Commission further found that the BPD expressed additional reservations related to the possibility that Walker had driven to work and had carried his police firearm while he had been drinking, but that the evidence did not support either concern.

from the agency” or to substitute its judgment for that of the agency. *Vaspourakan, Ltd. v. Alcoholic Beverages Control Comm’n*, 401 Mass. 347, 351 (1987).

The Commission is responsible for determining “whether, on the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” *City of Cambridge v. Civil Serv. Comm’n*, 43 Mass. App. Ct. 300, 303 (1997). Reasonable justification exists where an action is taken “upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” *Id.* at 304. “When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission. It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” *Id.*, and cases cited.

Furthermore, “the [C]ommission owes substantial deference to the appointing authority’s exercise of judgment in determining if there was reasonable justification shown. Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates, and ‘[p]rior misconduct has frequently been a ground for not hiring or retaining a police officer.’” *City of Beverly v. Civil Serv. Comm’n*, 78 Mass. App. Ct. 182, 188 (2010), quoting *City of Cambridge*, 43 Mass. App. Ct. at 305 (alteration in original). Here, the Commission substituted its judgment for that of the BPD with respect to its assessment of Walker’s arrest for operating under the influence. Furthermore, contrary to the

Commission's asseverations, the evidence in the administrative record provides no basis on which to conclude that overtones of political control or objectives unrelated to merit standards played any role in the BPD's evaluation of Walker.

First, the Commission baldly stated that Walker's testimony that he never operated a motor vehicle under the influence of alcohol in his life was credible. In doing so, the Commission "failed to adequately explain its reasons for crediting [Walker]" over the State Police arrest reports. *Herridge v. Bd. of Registration in Medicine*, 420 Mass. 154, 164 (1995), S.C. 424 Mass. 201 (1997).

Indeed, the Commission's criticism of the State Police reports as "unsubstantiated" applies with at least equal force to Walker's self-serving testimony. The Commission made no attempt to explain the reasoning for its decision to credit Walker's testimony over the arrest reports. See *Costello v. Dept. of Pub. Util.*, 391 Mass. 527, 535-536 (1984) ("While [a court] can conduct a meaningful review of a decision of less than ideal clarity if the agency's path may reasonably be discerned, we will not supply a reasoned basis for the agency's actions that the agency has not itself given.")

In addition, the Commission cited to no evidence whatsoever in support of its supposition that the BPD was motivated by some vague, undefined "bias" against Walker in its evaluation of him. The Commission made no attempt to explain, in specific terms, why the BPD might have been biased against Walker. See *id.*

Second, the Commission improperly assigned to the BPD the burden of proving its reason for bypassing Walker—his arrest—was true. See *City of Beverly*, 78 Mass. App. Ct. at 190 n.15 (appointing authority's obligation to provide reasonable justification for its actions does not

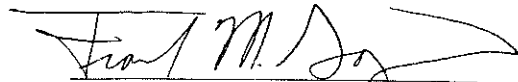
create “a specific burden of proving the truth of third party allegations of misconduct.”). In *City of Beverly*, an applicant for a position as a police officer was not hired based on evidence that suggested the applicant had been fired from a previous job for improperly accessing other employees’ voicemails. In proceedings before the Commission, the applicant denied improperly accessing voicemails. “[A]lthough the majority of commissioners . . . concluded that [the applicant] was a credible witness . . . [they] ultimately rested on the city’s failure to prove that the allegations of misconduct were in fact true, a burden . . . erroneously assigned to the city.” *Id.*

Analogously, the Commission’s decision suggests that it expected the BPD to prove that Walker had in fact operated a vehicle under the influence of alcohol. The BPD had no such obligation. The Commission’s purpose is not “to force an appointing authority to hire a job applicant for such a sensitive position unless it is able to prove to the [C]ommission’s satisfaction that the applicant in fact engaged in the serious alleged misconduct for which he was” not hired. *Id.* at 190.

Because Walker’s arrest for operating under the influence of alcohol provided reasonable justification for the BPD’s decision to bypass him on the list of eligible candidates, the court need not reach the other reasons provided in Hunt’s letter. However, the court adds that, to the extent the Commission suggested that Walker’s positive recommendations required the BPD to discount other facts that it found concerning, it is the BPD’s prerogative, and not the Commission’s, to balance the significance of those factors. See *City of Cambridge*, 43 Mass. App. Ct. at 305 .

### CONCLUSION AND ORDER

For the foregoing reasons, the BPD's Motion for Judgment on the Pleadings is, in all respects, **ALLOWED**. Walker's Motion for Judgment on the Pleadings is, in all respects, **DENIED**. The decision of the Commission is **VACATED** and remanded for further proceedings consistent with this opinion.



Frank M. Gaziano  
Associate Justice, Superior Court

DATED: November 29, 2010.